

JUL 1 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,

Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH, STATE
OF INDIANA; CASPER W. WEINBERGER;
SECRETARY OF HEALTH, EDUCATION AND
WELFARE; PARKVIEW MEMORIAL HOSPITAL,
INC.; THE LUTHERAN HOSPITAL, INC.;
ST. JOSEPH'S HOSPITAL OF FORT
WAYNE, INC.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

TERRY J. KINDLE
Deputy Attorney General

219 State House
Indianapolis, Indiana 46204

Telephone: (317) 633-6238

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented	1
Statement of the Case	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

	Page
<i>Cases.</i>	
<i>Lakeside Mercy Hospital, Inc. v. Indiana State Board of Health, et al.</i> , 421 F.Supp. 193 (1976)	2
<i>Statutes.</i>	
Indiana Administrative Adjudication Act, Indiana Code Section 4-22-1 et seq	4
Section 1122 Program, 42 U.S.C. § 1320 a-1	1
<i>Regulations.</i>	
42 C.F.R. § 100.106 (a) (4)	2
42 C.F.R. § 100.106 (c)	2
42 C.F.R. § 100.106 (c) (4)	2, 3
<i>HEW Guidelines.</i>	
DPA Manual—"Guidance and Procedures for Designated Planning Agencies in Administering Section 1122 of the Social Security Act," March 1974	3

IN THE Supreme Court of the United States

October Term, 1976

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,

Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH, STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARKVIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question presented in this cause can be succinctly stated as whether a state court involved in a state review of an application made pursuant to Section 1122 of the Social Security Act (42 U.S.C. § 1320 a-1) has jurisdiction to enjoin a state agency from considering any other proposals which would meet the same health needs as the proposal under review by the state court.

STATEMENT OF THE CASE

As stated in the opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, reported at 421 F.Supp. 193 and contained in the Petitioner's Appendix, the Indiana State Board of Health (hereinafter ISBH) had in 1973 and 1974 received five competing applications from various groups to fill a hospital bed need of 172 in the Fort Wayne, Indiana area. The first of these applications to complete the review process established by Section 1122 of the Social Security Act was that of Community Hospital of Fort Wayne, Inc. (hereinafter Community Hospital), a proposal to construct a new hospital. This application was disapproved by the ISBH on July 5, 1974 because the State Plan only contemplated expansion by an existing hospital. Subsequently, Community Hospital requested a "fair hearing" pursuant to 42 C.F.R. § 100.106(c), a portion of the implementing regulations under Section 1122. Upon receiving an unfavorable decision from the hearing officer, Community Hospital pursuant to 42 C.F.R. § 100.106(c)(4) filed a petition for judicial review of this decision in the Circuit Court of Allen County, Indiana. Community Hospital then faced the situation where the ISBH would be processing the other four proposals which sought to meet the same bed need as Community Hospital, as the ISBH was required to do under the time constraints imposed by the regulations, thus in actuality rendering moot any subsequent decision by the court. Therefore, Community Hospital sought, and was granted, the temporary restraining order of November 12, 1974, which was followed by the orders of December 9, 1974, December 31, 1974, and May 27, 1975 which enjoined the ISBH from considering any other proposals which would meet the same bed needs as the Community Hospital application.

ARGUMENT

The crux of the position of Lakeside Mercy Hospital, Inc. (hereinafter Lakeside) in its Petition is to question whether the restraining orders issued by the state courts tolled the running of the "time clocks" as established by the federal regulations, and to assert that this is a "significant question" which inevitably must be decided by the Supreme Court of the United States. However, a practical analysis of this case will reveal that the opinion of the federal district court, as affirmed by the Court of Appeals for the Seventh Circuit, is the only rational outcome possible for this cause.

First, it is apparent that in promulgating the federal regulations which are applicable to a Section 1122 review the Secretary of Health, Education, and Welfare contemplated the participation of state courts in the state review process. 42 C.F.R. § 100.106(c)(4) states:

Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided, That where judicial review of such decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.* (Emphasis added)

This concept of "judicial review" is expanded upon by the Secretary in the DPA Manual—"Guidance and Procedures for Designated Planning Agencies in Administering Section 1122 of the Social Security Act" which was pub-

lished in March, 1974. Section VI(f) of said Manual states:

State Appeals Processes

Many states have appeals processes established for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation.

In Indiana the vehicle for such judicial review by a state court of an administrative determination is the Administrative Adjudication Act, Indiana Code Section 4-22-1 et seq. This was the statute cited by Community Hospital in the Petition for Review filed with the Allen Circuit Court.

Second, it is axiomatic that if a state court is to conduct a meaningful review of a state review process, said court must have the inherent power to prevent that review from being rendered moot by an action of the very state agency whose decision the court is reviewing. Since pursuant to 42 C.F.R. § 100.106(a)(4) the failure of the ISBH to complete review of the four applications competing with Community Hospital within the prescribed periods would have the effect of a positive finding on all of said applications, the state courts were compelled to issue restraining orders against the ISBH which in effect stopped the time clocks for all competing proposals until the state court's review was completed.

Thirdly, the Secretary of Health, Education and Welfare, who promulgated the regulations which Lakeside seeks an interpretation of and who has been named a defendant in this cause, is in complete agreement with the analysis set forth above. It is certainly well-settled by deci-

sions of this Court that deference should be accorded to the Secretary's interpretation.

Therefore, the Indiana State Board of Health asserts that the Allen Circuit Court and the Wells Circuit Court had jurisdiction over the subject matter presented by the Community Hospital suit and the necessary jurisdiction over the Indiana State Board of Health to enjoin that agency from considering any other proposals which would meet the same bed needs as the Community Hospital application, pending the judicial review.

CONCLUSION

WHEREFORE, the Indiana State Board of Health respectfully submits that since Lakeside has failed to state a question which must inevitably be decided by this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

TERRY J. KINDLE
Deputy Attorney General

219 State House
Indianapolis, Indiana 46204

Telephone: (317) 633-6238